

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
CRIMINAL REVISION APPLICATION No. 306 of 2006

For Approval and Signature:

HONOURABLE MR. JUSTICE RAVI R. TRIPATHI

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1 Whether Reporters of Local Papers may be
allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the
fair copy of the judgment ?

4 Whether this case involves a substantial
question of law as to the interpretation
of the constitution of India, 1950 or any
order made thereunder ?

5 Whether it is to be circulated to the
civil judge ?

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SHAILESHKUMAR MAGANLAL MISTRY

Versus

MEMON SABIRBHAI & ORS. AND ANOTHER

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Appearance :

MR UTKARSH B JANI for the Petitioner

MR DHAVAL D VYAS for Respondent No.1

MR AJ DESAI, ADDITIONAL PUBLIC PROSECUTOR for Respondent No.2

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CORAM : HONOURABLE MR. JUSTICE RAVI R. TRIPATHI

Date : 06/10/2006

ORAL JUDGMENT

1. The petitioner being aggrieved by judgment and order of acquittal passed by the learned Judicial Magistrate First Class, Idar dated 01.10.2005 below Exh.16 in Criminal Case No.1897 of 2003 is before this Court.

2. Short facts giving rise to the present proceedings are that the petitioner - original complainant had filed complaint against the accused for the offence under Section 138 of the Negotiable Instruments Act. The accused preferred an application Exh.16 under Sections 258 and 155 of the Criminal Procedure Code and prayed that the proceedings be closed and the accused (applicant of Exh.16) be acquitted. The learned Judicial Magistrate First Class taking into consideration the submissions made on behalf of the accused and after mentioning the submissions made on behalf of the complainant, referring to the decision cited before him, allowed the application.

3. Initially, the applicant/petitioner had preferred Criminal Appeal No.193 of 2006 against this judgment and order, which was later on withdrawn on 18.04.2006 with a view to avail the appropriate remedy before the appropriate forum under the law, applicable to the subject matter. Subsequently, present revision application was filed which was delayed and hence, Criminal Misc.Application No.8189 of 2006 was filed seeking condonation of delay. Criminal Misc.Application No.8189 in this Criminal Revision Application was allowed by order dated 13.09.2006.

4. The short question arises in this revision application for consideration is as to weather the

Magistrate could have passed an order of dropping the proceedings and acquitting the accused by the impugned judgment and order, having issued the process?

5. Mr.Utkarsh B.Jani, learned advocate for the petitioner relied upon a decision of the Hon'ble the Apex Court in the matter of SUBRAMANIAM SETHURAMAN VS. STATE OF MAHARASHTRA AND ANOTHER, reported in 2005 SCC (Cri) 242. The learned advocate submitted that the Hon'ble the Apex Court has held that:

"The issuance of process under Section 204 is a preliminary step in the stage of trial contemplated in Chapter 20 CrPC. Such an order made at a preliminary stage being an interlocutory order, the same cannot be reviewed or reconsidered by the Magistrate, there being no provision under CrPC for review of an order by the same court."

The learned advocate further submitted that the Hon'ble the Apex Court has held that:

".... it is impermissible for the Magistrate to reconsider his decision to issue process in the absence of any specific provision to recall such order."

The learned advocate submitted that the Hon'ble the Apex Court has also held that:

"Once a plea is recorded in a summons case it is not open to the accused person to seek a discharge. The case involving a summons case is covered by Chapter 20 CrPC which does not contemplate a stage of

discharge like Section 239 which provides for a discharge in a warrant case. Therefore once the plea of the accused is recorded under Section 252 CrPC the procedure contemplated under Chapter 20 has to be followed which is to take the trial to its logical conclusion. The only remedy available to an aggrieved accused to challenge an order in an interlocutory stage is the extraordinary remedy under Section 482 CrPC and not by way of an application to recall the summons or to seek discharge, which is not contemplated in the trial of a summons case."

6. Learned advocate Mr.Jani submitted that this Court in the matter of **MEHTA PRAFULCHANDRA KALIDAS VS. PATEL CHELJIBHAI KALIDAS AND ANOTHER**, reported in 2006 (1) GLH 211 has followed the same course of action.

7. Mr.Dhaval D.Vyas, learned advocate for respondent No.1 tried to support the order passed by the learned Judicial Magistrate First Class on the ground that there is no material on which the accused can be held guilty of the offence with which he is charged.

He submitted that the learned Judge has taken pains to discuss in detail the evidence of the case and on having come to the conclusion that there is no sufficient material to hold the accused guilty, has passed the order under challenge.

8. In view of the law laid down by the Hon'ble the Apex Court that, 'the Magistrate has no power to reconsider

his decision to issue process, as there is no specific provision for the same in the Criminal Procedure Code,' and in view of the fact that the Hon'ble the Apex Court has pronounced that, 'the remedy available to an aggrieved accused is to challenge the order under Section 482 of the Criminal Procedure Code and not by way of an application to recall the summons or to seek discharge', this revision application deserves to be allowed.

9. This Revision Application succeeds. The order under challenge is quashed and set aside. The learned Judicial Magistrate First Class shall proceed with the matter in accordance with law. Rule is made absolute. Direct service is permitted.

At the request of Mr.Utkarsh B.Jani, learned advocate for the petitioner, the learned Judicial Magistrate First Class is directed to give preference to the matter and decide the same as expeditiously as possible.

(RAVI R.TRIPATHI, J.)

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